

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
STAGE DELICATESSEN EAST, INC. : DETERMINATION  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1984 :  
through February 28, 1985. :

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Petitioner, Stage Delicatessen East, Inc., 96 4th Street, Garden City, New York 11530, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1984 through February 28, 1985 (File No. 802770).

A hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1986 at 9:15 A.M., with all briefs to be filed by July 20, 1988. Petitioner appeared by Pace, Stuart and Black (Rinaldo A. Pace, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark Volk, Esq., of counsel).

ISSUES

I. Whether the petition was filed within 90 days after the issuance of the notice of determination as set forth at Tax Law § 1138(a)(1).

II. Whether petitioner, as the purchaser of a restaurant in a bulk sale, is liable for sales taxes determined to be due from a prior owner.

III. Whether the Audit Division correctly estimated tax due from the prior owner of the restaurant.

FINDINGS OF FACT

1. On July 25, 1985, the Division of Taxation ("Division") issued to petitioner, Stage Delicatessen East, Inc. ("Stage"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1984 through February 28, 1985, assessing tax of \$10,000.00. The notice explained that the tax was determined to be due from the Sugar Plum Restaurant and represented Stage's liability as the purchaser in a bulk sale pursuant to Tax Law § 1141(c). It also stated that Stage's liability was limited to the selling price of the assets purchased.

2. The petition was sent to the State Tax Commission via Federal Express on October 23, 1985, the ninetieth day after the notice was issued. The petition was delivered to the State Tax Commission on October 24, 1985.

3. On April 8, 1985, the Division received a Notice of Sale, Transfer or Assignment in Bulk from Stage. Relevant portions of the notice declare Stage to be the purchaser in a pending

sale, scheduled to occur on or about May 11, 1985. The seller is shown as Food Quotes, Inc. ("Food Quotes"), and the seller's business or trade name is shown alternatively as Sugar Plum Restaurant and Reatherford's Plum. The seller's certificate of authority identification number was left blank.

4. On April 8, 1985, the Division issued to Stage and to Stage's escrow agent notices of a possible claim for sales tax due. The notices instructed the parties to make no distribution of funds or property before being authorized to do so by the Division.

5. On May 2, 1985, the Division issued to Food Quotes a notice to seller requesting certain information, including: a final tax return for the period ended March 1, 1985, any sales tax returns not previously filed and the seller's tax identification number.

6. Food Quotes was a New York corporation which operated the Sugar Plum Restaurant. From 1979 through April 1981, Joseph Valin was a shareholder of Food Quotes.

7. On April 28, 1981, Mr. Valin transferred his entire interest in Food Quotes to three individuals: Ronald Reatherford, Gail Rose and Frank Piccolo. Concurrent with that transfer, Food Quotes agreed to pay Mr. Valin \$120,000.00 plus interest. To secure this debt, Food Quotes executed a series of 84 promissory notes and a security agreement pursuant to section 3 of the Uniform Commercial Code. By the agreement, Food Quotes conveyed to Mr. Valin a security interest in all furniture, fixtures and equipment on the premises of the Sugar Plum Restaurant. In addition, certain documents were placed in escrow, including: the resignations of Reatherford, Rose and Piccolo as officers of Food Quotes; all stock certificates issued to Reatherford, Rose and Piccolo; an original lease for the premises of Sugar Plum Restaurant executed on April 5, 1979; and an assignment of the lease from Food Quotes to Valin. The security agreement was executed on April 28, 1981 and filed in the offices of the Registrar of Suffolk County and the Secretary of State.

8. The Sugar Plum Restaurant continued to be operated by Food Quotes until August 4, 1984 when the restaurant ceased doing business.

9. On September 4, 1984, Valin notified Reatherford, Rose and Piccolo that they were in default and demanded payment of notes and rent. On September 11, 1984, Reatherford and Rose advised Valin that they were abandoning possession of the premises. Piccolo did the same shortly thereafter.

10. On October 8, 1984, Mr. Valin sold and transferred his security and secured position to Mr. Piccolo for the sum of \$97,149.67. The assignment to Mr. Piccolo was filed with the Secretary of State on October 28, 1984 and with the Suffolk County Clerk on October 25, 1984. Mr. Piccolo then proceeded to foreclose on the personal property of Food Quotes as provided for by the security agreement.

11. On November 12, 1984, a public auction was held at the premises of Sugar Plum Restaurant, and Mr. Piccolo received an auctioneer's title to the personal property previously owned by Food Quotes.

12. On February 19, 1985, Frank Piccolo, as the owner of the lease to the premises and the restaurant equipment, entered into a contract of sale with Stage. The subjects of the sale were: all equipment and merchandise contained in the restaurant's premises, good will and the assignment of the lease to the premises known as Sugar Plum Restaurant. The purchase price

was \$240,000.00.

### SUMMARY OF THE PARTIES' POSITIONS

13. By its answer to the petition, the Division asserted that the total sales tax liability of Food Quotes d/b/a Sugar Plum Restaurant for the period September 1, 1983 through February 28, 1985 is \$46,276.91. No evidence was submitted to establish the basis for that assertion. The record contains no evidence regarding the basis for the Division's determination that Sugar Plum Restaurant owed sales tax for the period December 1, 1984 through February 28, 1985.

14. The Division maintains that the petition, received 91 days after the issuance of the statutory notice, was not filed within 90 days after issuance of the notice of determination.

15. Stage asserts that, inasmuch as the petition was shipped within 90 days of issuance of the notice and received within the time a petition would ordinarily have been received if postmarked by the United States Postal Service on the date of shipment, the petition was timely. Stage did not establish that the petition or wrapper in which it was shipped bore a postmark.

16. Stage asserts two grounds as a basis for challenging the assessment:

(a) Stage maintains that it purchased assets from Mr. Piccolo and not from Food Quotes. It further argues that since prior transfers of property and ownership interests by Food Quotes to Mr. Valin and by Mr. Valin to Mr. Piccolo resulted from the execution of a lawfully executed and recorded security agreement, those transfers were not subject to the bulk sale provisions of the Tax Law.

(b) Stage contends that neither Food Quotes nor anyone else conducted business in the Sugar Plum Restaurant from August 4, 1984 through May 1985; accordingly, no sales tax liability could have been incurred for the period December 1, 1984 through February 28, 1985.

### CONCLUSIONS OF LAW

A. Under Tax Law § 1138(a)(1), a petition challenging a notice of determination issued pursuant to Article 28 of the Tax Law must be filed within 90 days after issuance of the statutory notice. The general rule is that the petition is deemed filed upon physical delivery (Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). Tax Law § 1147(a)(2) provides for deemed delivery when the United States Postal Service is used to effect delivery. It gave the State Tax Commission authority to provide, by regulation, for the application of the deemed delivery rule in the case of postmarks not made by the United States Post Office. The rules set forth in Tax Law § 1147(a)(2) are applicable only when a notice or other document is "delivered by United States mail".

Petitioner's reliance on Matter of Harron's Electrical Service (Tax Appeals Tribunal, February 19, 1988) is misplaced. Harron's merely applied the rules for deemed delivery promulgated by the State Tax Commission pursuant to the authority granted by Tax Law § 1147(a)(2) and found at 20 NYCRR 535.1(b)(2). Both the statute and the regulations apply only in those instances where delivery is effected by the United States Postal Service. Where delivery is effected by a private service of whatever nature, the general rule applies, i.e., the date of filing is the date of physical delivery. Accordingly, Stage's petition, delivered to the State Tax Commission 91 days after issuance of the statutory notice, was untimely.

B. As Stage's petition was not filed within 90 days after issuance of the notice of determination, the Division of Tax Appeals is without jurisdiction to determine the other issues raised in the petition.

C. The petition of Stage Delicatessen East, Inc., is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on July 25, 1985 is sustained.

DATED: Albany, New York

August 11, 1988

/s/ Jean

Corigliano

ADMINISTRATIVE LAW JUDGE